No. 12,238

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ELMER R. JOHNSON,
Appellee.

BRIEF FOR APPELLEE.

SHERIDAN DOWNEY, JR.,
1212 Broadway, Oakland 12, California,
Attorney for Appellee.

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Subject Index

Table of Authorities Cited

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STATEMENT OF THE CASE.

Appellant's statement of the facts in the case is substantially correct except that certain of the testimony given by appellee at the time of trial should have been included to clarify the rather sketchy outline of facts as presented in appellant's brief.

Appellee has admitted certain facts as requested by the Government, and among these facts is the statement that on the day of the accident John F. Moore was required by his duties to proceed to the dispensary at the Fifth Service Depot to turn in his daily report; that doing so, he met the plaintiff and asked the plaintiff to accompany him in his vehicle to the naval air-base. (R. 13.) Appellee has further admitted that

following this invitation to accompany Moore in his naval vehicle, several hours elapsed before the accident occurred. During this time the plaintiff spent some time at the club rooms in the ammunition depot, some time in cutting the hair of a number of seamen and some time in eating his evening meal. (R. 13 and 14.)

It is appellee's belief that the last of the request for admissions as phrased by the Government creates a confusion unless carefully studied. It would appear at first glance that Petty Officer Moore should have turned in his report some time early on the day of December 22, 1946, and that notwithstanding the fact that he was at the ammunition depot where the report was regularly turned in, he nevertheless postponed his duties for a period of several hours. Appellee feels that a careful study of the language in question indicates merely that appellee has conceded that on the day of December 22 at the completion of his duties that Moore was to turn in a report, but it is perfectly clear that appellee has not admitted that the report was to be turned in immediately following Moore's invitation to appellee to accompany him in his vehicle.

Appellee wishes to call the Court's attention to the testimony of appellee which makes the activity of Moore far more clear.

Johnson met Moore near his quarters at the naval airbase approximately one and a half miles north of the "town" of Agana. (R. 58.) Moore performed cer-

tain duties at that locality for approximately thirty minutes. (R. 58.) Moore then took Johnson in his naval vehicle to the naval ammunition depot approximately a mile and a half south of the airbase. (R. 59.) They first went in to certain living quarters where there were some medical things, then they went into the club rooms. Plaintiff stayed in the club rooms for about three quarters of an hour, but Moore was gone during part of that time. Then Moore came back and took Johnson and some sailors back to the airbase where Johnson cut the hair of about six sailors. (R. 60 and 61.) During the time that the hair was being cut, Moore did not remain at the barber shop all of the time. He remained there approximately three quarters of an hour. Johnson was not aware of what Moore was doing during the balance of the two and a half hour period. (R. 61.) Moore then drove Johnson and certain sailors north to Agana where the men ate their evening meal. This took about thirty-five minutes. (R. 62.) Moore then stated that he would have to go back to turn in his reports where he was stationed. It is clear that from the Government's request for admission of facts that Moore was stationed at the ammunition depot, and his report would have to be turned in there at the Fifth Service Dispensary. Moore agreed to take Johnson to his quarters enroute. (R. 63.) It is clear from the testimony of plaintiff and from the map introduced in evidence as Plaintiff's Exhibit No. 1 *that the place where plaintiff was to be dropped off was on the route which Moore would have to take in order to return directly to the Fifth Service*

Dispensary at the ammunition depot. On the road back, they stopped at the guardhouse for a few minutes and then proceeded toward plaintiff's quarters and toward the ammunition depot. The accident occurred shortly afterwards.

ARGUMENT.

I.

THE SERVANT OF THE GOVERNMENT WAS ACTING IN THE LINE OF DUTY.

It is appellee's firm belief that a reading of the entire testimony discloses that the petty officer was unquestionably authorized to drive a certain converted ammunition carrier; that he was on duty the day of the accident; that it was necessary to drive the vehicle to many different parts of the naval base on Guam; that never during the day was the vehicle taken from the naval base; that there was no prohibition from his superior officers which would have prevented him from offering rides to other naval employees where such rides could be given as an incident to his regular movements with the vehicle; that the accident occurred at a time when the petty officer was proceeding by the shortest and most direct route to perform a regular duty for the navy: to-wit, the turning in of his daily report; that it would be unfair to require appellee to prove that during those parts of the afternoon when Moore was absent from appellee's view that Moore was actually engaged in service of the navy.

The fact that Moore ate dinner at a regular naval eating place prior to turning in his report would seem to be consistent with the apparent latitude granted to him in operating the vehicle somewhat at his own discretion. Counsel for appellee has previously submitted a brief for the benefit of the trial Court which sets forth those Federal decisions which appear to shed most light on the question of responsibility of the master for the acts of his servant when the servant is operating the motor vehicle of the master. We wish to call to the Court's attention those citations which are found in the reporter's transcript, pages 21 to 24.

It would seem that the decision of the Eighth Circuit in *Thomas v. Slavens,* 78 Fed. (2d) 144, and the decision of the Ninth Circuit in *Babcock v. Tam,* 156 Fed. (2d) 116, fairly express the rule to be followed in determining responsibility of the master for the acts of a servant while operating a motor vehicle.

At the time of the trial no Circuit Court had as yet found occasion to decide a case involving a question of the meaning of the words "Line of duty," as found in the Tort Claims Act. Since that time two decisions have been handed down. One of these was a decision of the Fifth Circuit, *United States v. Campbell,* 172 Fed. (2d) 500, and the second was also a decision by the Fifth Circuit, *Hubsch v. United States,* 174 Fed. (2d) 7. In the *Campbell* case the Circuit Court reverses the lower Court where the lower Court awarded judgment to an elderly woman who was knocked down when run into by a sailor who was running to

catch a train at a railroad depot. In the *Hubsch* case the Circuit Court upheld the lower Court in finding that liability against the Government could not be established where an army lieutenant was driving a jeep in an intoxicated condition in the early morning hours enroute to have breakfast at Miami Beach.

In both of these decisions the Fifth Circuit Court makes it plain that the Government employee must actually be performing a service for the Government at the time of the accident, but the Court finds that in each instance the military person involved was on a mission totally unconnected with any Government service. We feel that in this case where it is clear that the petty officer was enroute to turn in a navel report that an entirely different situation is presented.

II.

THE COURT DID NOT ERR IN FINDING THAT THE NAVAL EMPLOYEE WAS NEGLIGENT.

In this connection the Court should note that the appellee had nothing whatsoever to do with the operation of the vehicle in question, that the vehicle in question was a naval vehicle, and that the road over which the vehicle was moving was a road on the Government-owned naval base on the Island of Guam.

This case then apparently falls squarely under the doctrine of *res ipsa loquitur*. From Johnson's testimony that the vehicle simply began to shimmy and then suddenly turned over, it would seem that an inference of negligence arises and certainly the Gov-

ernment did not dispel this inference by any explanation offered at the trial.

The Federal Courts have long recognized the doctrine of *res ipsa loquitur,* and apparently the Federal decisions are controlling in this case inasmuch as as yet the Courts in Guam have issued no decisions, and the Guam code which is quoted at length in the transcript, would impose no restriction on the doctrine.

In conclusion, it is appellee's belief that viewing all of the circumstances it is apparent that the accident most certainly occurred at a time when the naval vehicle was being driven to the benefit of the United States Government and that most certainly the naval employee involved was performing a reasonable act in properly completing his regular daily duties on behalf of the Government. Appellee respectfully urges this Court to sustain the findings of the District Court.

Dated, Oakland, California,
October 5, 1949.

Respectfully submitted,
SHERIDAN DOWNEY, JR.,
Attorney for Appellee.